



FILED

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Department of Health and Human Resources, Bureau for Public Health

RULE: 64 CSR 48. Emergency Medical Services

STATUTORY AUTHORITY: W. Va. Code §§ 16-1-4; 16-4C-6, 14, 23; 29A-3-15.

DATE FILED AS AN EMERGENCY RULE: September 4, 2020.

Following review under W. Va. Code §29A-3-15a, which requires the Secretary of State to determine that the agency filing such emergency rule: 1) has not exceeded the scope of law authorizing or directing the promulgation thereof; 2) has shown that an emergency exists justifying the promulgation of an emergency rule; and 3) filed the emergency rule in compliance with W. Va. Code §29A-3-15, it is the decision of the Secretary of State that the above emergency rule is **Approved**.

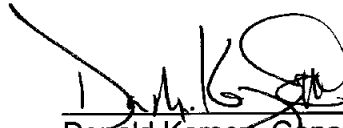
It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f):

☒ (1) For the immediate preservation of the public peace, health, safety and welfare;

☐ (2) to comply with a time limitation established by the W. Va. Code or by a federal statute or regulation; or

☒ (3) to prevent substantial harm to the public interest.

Additional notes or comments (if any): See attached memorandum.


Donald Kersey, General Counsel
WV Secretary of State's Office

MEMORANDUM

Subject: Emergency Rule Decision Analysis
Rule: 64 CSR 48. Emergency Medical Services
Agency: Department of Health and Human Resources, Bureau for Public Health
Date: September 30, 2020
By: Donald Kersey, General Counsel, WV Secretary of State

I. Abstract

In light of the complex nature of the emergency rule-making process and underlying facts in this matter, this Memorandum sets forth the grounds upon which the Office of the Secretary of State bases its determination that the emergency rule filed by the Department of Health and Human Resources/Bureau for Public Health at 64 CSR 48 (Emergency Rule) satisfies the emergency rule-making requirements and is approved.

II. Summary of Interested Parties' Positions

Upon a preliminary review of the Emergency Rule, the Secretary of State, by his counsel, determined that additional information was necessary to properly determine whether the Emergency Rule should be approved.

Under his authority in W. Va. Code § 29A-3-15a(c), the Secretary requested additional information from DHHR and considered other interested parties' comments regarding the proposed Emergency Rule.

The comments provided by non-agency interested parties are summarized as follows:

1. All EMS services providers agree with the general goal of requiring face coverings to be worn by providers in certain situations;
2. Many EMS services providers already have strict policies requiring protective masks or face coverings in certain circumstances;
3. Some EMS services providers' policies currently exceed the requirements set forth in the proposed Emergency Rule, which could result in decreased health or safety benefits;
4. DHHR has authority under current regulations to enact the policy goals without promulgating an emergency rule; and
5. Legislative rules are not appropriate for short-term policy changes.

The additional information provided by DHHR included a letter of justification and written responses to specific questions, copies of which are attached hereto. In sum, the DHHR contends the following:

1. DHHR has the authority to promulgate emergency rules;
2. The administrative policy making and review procedures set forth in W. Va. Code § 16-4C-6(a) for EMS services does not apply to emergency legislative rules;
3. The emergency rule-making procedures are the most expeditious and legally sufficient manner for implementing the DHHR's desired policy goals in this case;
4. The Medical Policy and Care Committee (MPCC) is a policy and procedure body, not an administrative rule-making body;
5. The Emergency Medical Services Advisory Council (EMSAC) will be consulted on the Emergency Rule's provisions before it is considered by the Legislative Rule-Making Review Committee in November 2020; and
6. Despite local policies in effect, the Office of Emergency Medical Services has received information that some EMS personnel do not follow, or are not required to follow, the policies that require the use of face coverings and other measures to mitigate exposure of COVID-19.

III. Emergency Rule-Making Requirements and Procedures

Pursuant to W. Va. Code § 29A-3-15(a), "[a]ny agency with authority to propose legislative rules may, without hearing, find that an emergency exists requiring that an emergency rule be promulgated and promulgate the emergency rule in accordance with this section[,]" which emergency rule shall be filed with "the Secretary of State and . . . the Legislative Rule-Making Review Committee."

Under W. Va. Code § 29A-3-15a(b), the Secretary of State, as the agency charged with preliminarily reviewing an emergency rule prior to formal consideration by the Legislative Rule-Making Committee, may reject an emergency rule if any of the following findings are made:

1. The emergency rule exceeds the scope of the law authorizing or directing the promulgation thereof;
2. An emergency does not exist justifying the promulgation of the emergency rule; or
3. The emergency rule was not promulgated in compliance with the provisions of § 29A-3-15.

Generally regarding interested parties' disagreement with an agency's proposed emergency rule, W. Va. Code § 29A-3-15(a)(1) provides "[a]n emergency rule may not be disapproved . . . on the basis that the Secretary of State . . . disagrees with the underlying public policy established by the Legislature in enacting the authorizing legislation. . . ."

Regarding the consideration of additional information and interested parties' input prior to approving or disapproving an emergency rule, W. Va. Code § 29A-3-15a(c) provides:

If, however, the Secretary of State concludes that the information submitted by the agency is insufficient to allow a proper determination to be made as to whether the emergency rule should be disapproved, he may make further investigation, including, but not limited to, requiring the agency or other interested parties to submit additional information or comment or fixing a date, time and place for the taking of evidence on the issues involved in making a determination under the provisions of this section.

Regarding the Legislative Rule-Making Review Committee's authority to determine whether an emergency rule is appropriate, W. Va. Code § 29A-3-15(e) provides:

The Legislative Rule-Making Review Committee may review any emergency rule to determine: (1) Whether the emergency rule . . . exceeds the scope of the law authorizing or directing its promulgation; (2) whether there exists an emergency justifying the promulgation of the emergency rule; and (3) whether the emergency rule was promulgated in compliance with the requirements and prohibitions contained in this section. The committee may recommend to the agency, the Legislature or the Secretary of State any action it determines appropriate.

Finally, regarding the existence of an "emergency," W. Va. Code § 29A-3-15(f) provides:

For the purposes of this section, an emergency exists when the promulgation of an emergency rule is necessary: (1) For the immediate preservation of the public peace, health, safety or welfare; (2) to comply with a time limitation established by this code or by a federal statute or regulation; or (3) to prevent substantial harm to the public interest.

IV. Analysis

The Secretary of State's specific authority to disapprove an emergency rule is limited to three distinct criteria specified by W. Va. Code § 29A-3-15a(b). Each of those criteria are discussed separately below.

- a. The emergency rule does not exceed the scope of the law authorizing or directing the promulgation thereof because the agency has the statutory authority to promulgate emergency rules.

64 CSR 48 is a Legislative Rule promulgated under W. Va. Code §§ 16-1-4, 16-4C-1 *et seq.* by the Commissioner¹ for the Bureau of Public Health (BPH), both of which are overseen and governed by the Secretary of the Department of Health and Human Resources (DHHR).²

According to W. Va. Code § 16-1-3(b), “[a]ll powers and duties of the director of health³ previously established by former section ten of this article that are not specifically included in this chapter as powers and duties of the commissioner are powers and duties of the secretary.”

Turning to the statutory authority to promulgate rules, the DHHR Secretary’s authority in W. Va. Code § 16-1-4 is generally subject to the contingency in subsection (b)(6), which provides, “[a]ny regulation of emergency medical service attendants and emergency medical care technician-paramedics may not exceed the provisions of §16-4C-1 *et seq.* of this code[.]”

Under W. Va. Code § 16-4C-6(a), the BPH Commissioner must provide a proposed rule “at least 30 days in advance for review by the Emergency Medical Services Advisory Council, who may act only in the presence of a quorum[.]” W. Va. Code § 16-4C-23 also restates the BPH Commissioner’s rule-making authority for promulgating rules under W. Va. Code § 16-4C-1 *et seq.*

Furthermore, CSR § 64-48-9.1.2 establishes the Medical Policy and Care Committee (MPCC), which “serves as the primary policy making body and advisory body to the State Medical Director concerning medical issues involving the emergency medical services system.” Under its duties, the MPCC shall:

Create, review, and approve treatment, triage, and transportation protocols used within the state EMS system;

Determine medications, equipment, and procedures used within OEMS;

...

Act on and advise the State Medical Director on emergency health related issues;

...

Implement procedures necessary to carry out its duties[.]

CSR § 64-48-9.1.2.a.1, 2, 4, and 6.

¹ “‘Commissioner’ means the commissioner of the bureau, who is the state health officer[.]” W. Va. Code § 16-1-2(4).

² The Rule is technically under the purview of the BPH, which is a subordinate agency of the DHHR. The BPH Commissioner was appointed by and is under the ultimate supervision of the DHHR Secretary.

³ “‘Director’ or ‘director of health’ means the state health officer. Administratively within the department [of health and human resources], the bureau through its commissioner carries out the public health functions of the department, unless otherwise assigned by the secretary[.]” W. Va. Code § 16-1-2(7).

The process for proposing “any changes in protocol, medication and procedure, scope of practice, or policy and procedure” are set forth in CSR § 64-48-9.1.2.b. This is a unique and complex policy making process. In sum, the EMS services providers interpret the process as follows in chronological order:

1. The MPCC shall meet “as necessary” under CSR 64-48-9.1.2 to discuss and propose policy changes;
2. Publish notice and the full text of the proposed changes on the OEMS website, and provide the notice and full text of the proposed changes to each EMS agency;
3. Establish a 30-day public comment period on the proposed changes, unless the MPCC waives the public comment period after finding “exigent circumstances exist and . . . the proposed changes . . . must be implemented immediately to ensure patient safety[;]”
4. Although the 64 CSR 48 is silent on the next step, referring back to W. Va. Code § 16-4C-6(a), the MPCC shall then provide the proposed policy to the BPH Commissioner;
5. The BPH Commissioner shall then draft a proposed rule based on the policy changes recommended by MPCC, and provide the proposed rule “at least 30 days in advance for review by the [EMSAC;]”
6. Upon approval, the EMSAC issues its decision to the DHHR, who may then file the proposed rule under the state Administrative Procedures Act, which could take up to forty-two (42) days before going into effect, unless sooner approved by the Secretary of State.

The DHHR contends that the above policy making process is exempt from the legislative rule-making procedures in emergency situations. Upon review of the law, which must be read consistently and not in conflict under principals of statutory interpretation, the Secretary of State has determined that there are two separate processes for DHHR to promulgate rules. Importantly, the Secretary of State’s authority to disapprove an emergency rule do not include a situation where an agency chooses one policy making process over another.

Specifically, W. Va. Code § 29A-3-15(a) provides, “[a]ny agency with authority to propose legislative rules may, without hearing, find that an emergency exists requiring that an emergency rule be promulgated and promulgate the emergency rule in accordance with this section.”

The rule-making process that ultimately requires the BPH Commissioner to provide a proposed rule to the EMSAC does not contemplate emergency rules. It provides agency discretion over policy making changes in emergency situations, but the law does not expressly require DHHR to follow that process to promulgate an emergency rule.

Rather, DHHR, as the regulatory and supervisory parent agency of BPH, EMSAC, and the agency which created the MPCC under CSR § 64-48-9.1.2, has authority under W. Va. Code §§ 16-1-4 and 29A-3-15 to promulgate emergency rules when it deems necessary in the manner it sees fit for the situation.

Therefore, the DHHR has the authority to follow the emergency rule-making procedures in W. Va. Code § 29A-3-15 when an emergency exists. While consultation with the MPCC and EMSAC is permissible, it is an option rather than a mandate.

Nevertheless, for the benefit of input from industry experts and EMS services providers, the DHHR asserts it will provide the proposed Emergency Rule to the EMSAC for review before it is considered by the Legislative Rule-Making Review Committee. The Legislative Rule-Making Review Committee stated to DHHR that the Emergency Rule will be considered at a public hearing in November of 2020.

- b. An emergency exists justifying the promulgation of the emergency rule because the agency reports that, despite local EMS policies in effect, there are EMS workers who are not following those policies, which could be detrimental to the public health and availability of EMS services.

Based on the additional information provided by DHHR, the Emergency Rule was filed before DHHR sought any formal review by the EMSAC due to current emergency conditions and the immediacy of the issue.

According to a letter sent to the Secretary of State's counsel on September 18, 2020, the DHHR's general counsel wrote:

Emergency medical services (EMS) personnel are on the front lines of the pandemic, often serving ill or potentially ill patients with life saving measures that expose these first responders to a high level of exposure due to the aerosol transmission of the virus. Personnel becoming ill with the virus are likely not available for service for at least 14 days depending on the severity of their illness.

Between March 1, 2020, and August 31, 2020, 46 EMS personnel in West Virginia have contracted the COVID-19 virus. The EMS system in West Virginia is essential to protecting the health and welfare of our residents. Given the very large geographic service areas that our system must cover, any disruptions to service because of widespread infection could be catastrophic to individuals experiencing medical emergencies.

The Centers for Disease Control and Prevention has issued guidance to the EMS community regarding the necessity for the use of face coverings, eye protection, and other measures to prevent the spread of the virus. The Department of Health and Human Resources (DHHR) Office of Emergency Medical Services has repeatedly communicated to the EMS community the necessity for the use of face coverings and other measures to mitigate exposure to the virus. Nonetheless, the Office of Emergency Medical Services receives information on a routine basis that some EMS personnel do not follow or are not required to follow this guidance.

...

Thus, the DHHR has filed amendments to the rule as necessary for the immediate preservation of the public peace, health, safety, or welfare in accordance with W. Va. Code §29A-3-15(f)(1).

Under W. Va. Code § 29A-3-15(f), an emergency exists:

1. For the immediate preservation of the public peace, health, safety or welfare;
2. To comply with a time limitation established by this code or by a federal statute or regulation; or
3. To prevent substantial harm to the public interest.

The assertions by the DHHR regarding the existence of an emergency satisfy at least one, and perhaps two, of the three criteria justifying the promulgation of the Emergency Rule.

Specifically, (1) for the immediate preservation of the public health, safety or welfare, which may be threatened if EMS services are disrupted due to a COVID-19 outbreak in EMS personnel; and (2) to prevent substantial harm to the public interest because “the Office of Emergency Medical Services receives information on a routine basis that some EMS personnel do not follow or are not required to follow this guidance.”

In opposition to this contention, many interested parties’ commented that DHHR can implement the policy changes set forth in the Emergency Rule under existing regulations and procedures. Additionally, opponents assert that an emergency rule is inappropriate for implementing short-term policies.

However, the Secretary of State’s authority to disapprove an emergency rule does not include the underlying policy behind its promulgation. Likewise, the existence of alternative options for implementing the policy goals is not an appropriate reason for disapproval under the law.

Therefore, because EMS services providers and persons who receive EMS services may be exposed to COVID-19 by EMS personnel who “do not follow or are not required to follow this guidance [of wearing a face covering in certain circumstances,]” DHHR has provided sufficient justification of an emergency necessitating the promulgation of the Emergency Rule. As such, an emergency does exist.

- c. The emergency rule was promulgated in compliance with the provisions of § 29A-3-15 because the agency followed all requirements to propose an emergency rule.

Under the third and final condition upon which an emergency rule may be disapproved, the law requires certain information and opportunities to be provided to the public for notice and comment.

The procedures set forth in W. Va. Code § 29A-3-15 are built-in to the electronic-rules filing procedures and forms, which are summarized as follows:

The agency shall file along with the proposed emergency rule:

1. A statement of the facts and circumstances constituting the emergency;
2. A listing of state agencies, professions, businesses and other identifiable interest groups affected by the proposed emergency rule. However, an agency's good faith failure to list all known state agencies, professions, businesses and other identifiable interest groups is not a basis for disapproval of the emergency rule or does not subject the emergency rule to judicial review.
3. A statement by the agency of the circumstances constituting the emergency requiring the adoption; and
4. A notice of public hearing on the proposed rule within thirty days of the date the proposed rule.

With the exception of a listing of state agencies and other identifiable interest groups affected by the proposed Emergency Rule, the above criteria have been satisfied by DHHR for 64 CSR 48, which may be seen in the forms and other materials provided by the agency attached hereto.

Per W. Va. Code § 29A-3-15(a), the agency's good faith failure to provide the listing "is not a basis for disapproval of the emergency rule or does not subject the emergency rule to judicial review." Likewise, the notice of public hearing may usually be satisfied by establishing a public comment period, which shall be open for at least thirty (30) days.

Therefore, the DHHR satisfied the provisions of W. Va. Code § 29A-3-15, which included a Notice of Public Comment Period filed on September 4, 2020 establishing a thirty-one (31) day written public comment period. As such, there are no ground upon which the Secretary of State may disapprove the Emergency Rule under this third rule-making condition.

V. Additional Considerations

In light of the opposition to this Emergency Rule, the Secretary of State notes the following additional considerations:

a. Public Comment Opportunity and Legislative Rule-Making Review Committee Hearing

The Notice of Public Comment Period filed by the DHHR with the proposed Emergency Rule includes a public comment procedure whereby interested parties may file written comments for consideration by the DHHR and Legislative Rule-Making Review Committee.

The Notice is attached hereto, which provides that written comments may be emailed or mailed by October 5, 2020, to the following DHHR representative:

April L. Robertson, General Counsel
One Davis Square, Suite 100 E
Charleston, WV 25301
April.L.Robertson@wv.gov

Additionally, pursuant to W. Va. Code § 29A-3-15(e), the Legislative Rule-Making Review Committee may review any emergency rule to determine:

1. Whether the emergency rule or an amendment to the emergency rule exceeds the scope of the law authorizing or directing its promulgation;
2. Whether there exists an emergency justifying the promulgation of the emergency rule; and
3. Whether the emergency rule was promulgated in compliance with the requirements and prohibitions contained in this section.

As mentioned above, the Legislative Rule-Making Review Committee stated to the DHHR that the Emergency Rule will be considered at a public hearing in November of 2020. Following the hearing, the Review Committee may recommend to the agency, the Legislature, or the Secretary of State, any action it determines appropriate.

Interested parties who wish to attend the hearing should contact the Legislative Rule-Making Review Committee for more information regarding in-person or audio-visual attendance, and are encouraged to inquire into opportunities to address the Emergency Rule during the hearing.

b. Judicial Review

There are also three general, limited options for an aggrieved party to challenge an emergency rule's validity. They are summarized as follows:

1. Notwithstanding the exception for a good faith failure to provide a listing of potentially affected agencies or parties, W. Va. Code § 29A-3-15(a) provides that an aggrieved party may challenge the validity of the Emergency Rule in court. The challenge is to be considered under a de novo review by any court having original jurisdiction of an action challenging the Emergency Rule's validity.
2. Under W. Va. Code § 29A-3-15(d), if an agency "use[s] the provisions of this section to avoid or evade any provision of this article or any other provisions of this code, including any provisions for legislative review and approval of proposed rules[.]" the Emergency Rule "promulgated for that purpose may be contested in a judicial proceeding before a court of competent jurisdiction."

3. Under W. Va. Code § 29A-3-15a(e), the Secretary of State's decision may be challenged in limited circumstances. Specifically, the law provides:

The determination of the Secretary of State shall be reviewable by the Supreme Court of Appeals [of West Virginia] under its original jurisdiction, based upon a petition for a writ of mandamus, prohibition or certiorari, as appropriate. Such proceeding may be instituted by:

1. The agency which promulgated the emergency rule;
2. A member of the Legislature; or
3. Any person whose personal property interests will be significantly affected by the approval or disapproval of the emergency rule by the Secretary of State.

VI. Conclusion

The Secretary of State's authority to disapprove an emergency rule is limited to the specific reasons set forth in W. Va. Code §§ 29A-3-15, 15a.

The comments provided by the EMS services community were very helpful for understanding the issues at hand. Specifically, the comments majorly contended that DHHR did not follow the statutory and regulatory procedure for promulgating rules, that an emergency does not exist, the Emergency Rule could have negative immediate and future impacts, and that there is an alternative process for issuing policies at the local EMS level.

However, as discussed hereinabove, neither opposition to Emergency Rule nor the alternative policy making procedure are sufficient justifications for disapproval by the Secretary of State under the law. Additionally, DHHR's emergency rule-making authority is not contingent upon prior approval by the ESMAC in emergency situations. Rather, DHHR has the statutory authority to promulgate emergency rules when an emergency exists under the procedures it deems most appropriate under the circumstances.

After significant statutory and factual review, the Secretary of State has determined that the Emergency Rule is approved, and cannot be disapproved, under the analysis detailed in this Memorandum. Specifically:

1. The DHHR has statutory authority to file the emergency rule, which will be presented to EMSAC for review, and considered by the Legislative Rule-Making Review Committee in November of 2020;
2. An emergency exists because, although current policies require local EMS services providers to wear face coverings in certain situations, the Office of Emergency Medical Services is still receiving reports that some EMS personnel are not following or required

to follow the local policies, which goes against the public interest and may cause harm to the public or other EMS personnel; and

3. The rule-making procedures set forth in W. Va. Code § 29A-3-15 were followed by DHHR.

Finally, if under W. Va. Code § 29A-3-15(e) the Legislative Rule-Making Review Committee finds the Emergency Rule is not appropriate, it may “recommend to the agency . . . or the Secretary of State any action it determines appropriate.”

Therefore, for the foregoing reasons, the Emergency Rule filed by the DHHR under 64 CSR 48 is approved.

PREPARED BY:

/s/ Donald M. Kersey, III

Donald M. Kersey, III

General Counsel

West Virginia Secretary of State’s Office

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Charleston, WV 25305

(304) 558-6000

DKersey@wvsos.gov



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of the General Counsel

Bill J. Crouch
Cabinet Secretary

April L. Robertson
General Counsel

September 18, 2020

Donald M. Kersey, III
General Counsel
West Virginia Secretary of State's Office

via email: DKersey@wvsos.com

RE: Justification for Emergency Filing of 64CSR48

Dear Mr. Kersey:

The emergency nature of the COVID-19 pandemic is well documented. Emergency medical services (EMS) personnel are on the front lines of the pandemic, often serving ill or potentially ill patients with life saving measures that expose these first responders to a high level of exposure due to the aerosol transmission of the virus. Personnel becoming ill with the virus are likely not available for service for at least 14 days depending on the severity of their illness.

Between March 1, 2020, and August 31, 2020, 46 EMS personnel in West Virginia have contracted the COVID-19 virus. The EMS system in West Virginia is essential to protecting the health and welfare of our residents. Given the very large geographic service areas that our system must cover, any disruptions to service because of widespread infection could be catastrophic to individuals experiencing medical emergencies.

The Centers for Disease Control and Prevention has issued guidance to the EMS community regarding the necessity for the use of face coverings, eye protection, and other measures to prevent the spread of the virus. The Department of Health and Human Resources (DHHR) Office of Emergency Medical Services has *repeatedly* communicated to the EMS community the necessity for the use of face coverings and other measures to mitigate exposure to the virus. Nonetheless, the Office of Emergency Medical Services receives information on a routine basis that some EMS personnel do not follow or are not required to follow this guidance.

For these reasons, the medical director and the interim director of the Office of Emergency Medical Services believe the availability of EMS personnel is critical to the health and welfare of the residents of this state and the likelihood of illness without the precautions. Thus, the DHHR has filed amendments to the rule as necessary for the *immediate* preservation of the public peace, health, safety, or welfare in accordance with W. Va. Code §29A-3-15(f)(1).

Sincerely,

April L. Robertson

General Counsel

Donald Kersey

From: Robertson, April L <April.L.Robertson@wv.gov>
Sent: Friday, September 18, 2020 5:12 PM
To: Donald Kersey
Subject: FW: [External] RE: [External] RE: [External] 64 CSR 48 - Request for Additional Information
Attachments: e100 viral syndrome pandemic triage protocol_ (2).pdf; e101 mdi protocol mrm version 4.1.20 (1).pdf; e102 cct advanced airway interim guidance.pdf

Mr. Kersey:

Please see DHHR's answers to your questions below in RED.

Also, there may be support for suspending the provisions of W. Va. Code 16-4C-6(a) if you believe it remains a barrier.

Thanks,

April

From: Donald Kersey <DKersey@wvsos.com>
Sent: Friday, September 18, 2020 1:12 PM
To: Robertson, April L <April.L.Robertson@wv.gov>
Subject: [External] RE: [External] RE: [External] 64 CSR 48 - Request for Additional Information

CAUTION: External email. Do not click links or open attachments unless you verify sender.

April,

I may have missed your call just a few moments ago. I have to turn my attention to another matter for the next hour or so, but I put my questions in writing for your review. I'll give you a call as soon as I get a chance.

If any of the following is incorrect, please correct:

1. The "Secretary" is the Secretary of the DHHR.
2. The "commissioner" is the commissioner of the Bureau for Public Health, who is appointed by and subordinate to the Secretary.
3. The emergency rule for CSR § 64-48 is offered by the Bureau for Public Health under the Commissioner's authority.

W. Va. Code §16-1-3(b) accommodates the incorporation of the Bureau for Public Health under the authority of the Secretary of the Department of Health and Human Resources.

Regarding statutory authority, the Secretary's general statutory in W. Va. Code § 16-1-4 is subject to the contingency in subsection (b)(6), which provides, "[a]ny regulation of emergency medical service attendants and emergency medical care technician-paramedics may not exceed the provisions of §16-4C-1 et seq. of this code[.]"

Looking to W. Va. Code § 16-4C-6(a), the Commissioner of BPH is required to provide a rule “at least 30 days in advance for review by the Emergency Medical Services Advisory Council, who may act only in the presence of a quorum[.]”

The EMSAC will be asked to review the rule before it is considered by the Legislative Rule-Making Review Committee, well before the rule would become final. Because of the emergency conditions and the immediacy of the issue, the rule was filed as an emergency rule prior to review by the EMSAC.

With that in mind and looking further to W. Va. Code § 16-4C-23, which restates the Commissioner’s rule-making authority for rules promulgated under Article 4C, because statutes must be read consistently in *pari materia*, can you explain how the Commissioner’s rule-making authority in W. Va. Code § 16-4C-23 is not subject to the requirements of W. Va. Code § 16-4C-6(a)? Put differently, why is the rule-review process in § 16-4C-6(a) not applicable here?

Regarding the timing issue, I understood that the BPH sought the most expedient way to implement this policy change to protect the public health. BPH determined an emergency rule meets that goal.

However, looking to CSR § 64-48-9.1.2.b, the Medical Policy and Care Committee (MPCC) is “the primary policy making body and advisory body to the State Medical Director [*i.e.* Commissioner][.]” Per the BPH Rule, “the MPCC may waive the [30-day] public comment period when it finds that exigent circumstances exist and that the proposed changes in protocol, medication and procedure, scope of practice, or policy and procedure must be implemented immediately to ensure patient safety.”

The domain of the MPCC is policy and procedure and not specifically rule-making, although many of the MPCC-approved policies become incorporated into a rule for enforcement purposes. The MPCC has officially acted to approve several emergency COVID-19 policies, which are attached. Each of the attached policies address the use of PPE by EMS agencies and have been reviewed and issued at the direction of the MPCC.

If the MPCC can waive the 30-day public comment period, which (I think) would mean the policy change can be implemented immediately, how is the 42-day emergency rule timeline more efficient than following the process laid out in W. Va. Code § 16-4C-1 if the MPCC waives the comment period?

Regarding the written comments from the EMS Coalition group, which seems to represent the MPCC or EMS personnel in some capacity, I believe everyone agrees that the face covering mandate is satisfactory. However, the (1) manner of implementing the requirement via emergency rule without following § 16-4C-6(a), and (2) long-term concerns with the requirement remaining in existence after the pandemic ceases, seem to be at issue.

To me, although their comments are important, our role is to determine whether the authorizing statute was followed; not the policy behind the decisions. However, I do have concerns with the authority here as I laid out above. Any clarification here will be helpful for me so that I may understand all the working parts and advise the Secretary accordingly.

Thanks,
Deak

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Donald M. Kersey, III
General Counsel
West Virginia Secretary of State’s Office
304-558-6000 (Office)
[REDACTED]
304-558-0900 (Fax)